

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

US EPA RECORDS CENTER REGION 5



515551

United States of America,

Plaintiff,

and

State of Minnesota, by its
Attorney General Warren
Spannaus, its Department of
Health, and its Pollution
Control Agency,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical
Corporation; Housing and
Redevelopment Authority of
St. Louis Park; Oak Park
Village Associates; Rustic
Oaks Condominium, Inc.; and
Phillip's Investment Co.,

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical
Corporation,

Defendant,

and

City of Hopkins,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical
Corporation,

Defendant.

Civil No. 4-80-469

WRITTEN STATEMENT OF THE
CASE OF THE CITY OF
ST. LOUIS PARK

On the basis of the case preparation to date, which is not complete, the City of St. Louis Park submits the following written statement of the case. It is anticipated that modification to this statement will be made in the light of future case preparation.

1. Name, address and occupation of client.

The City of St. Louis Park, 5005 Minnetonka Boulevard,
St. Louis Park, Minnesota 55416.

2. Name of insurance carriers involved.

None.

3. Names and addresses of witnesses who may be called at trial by the City of St. Louis Park.

It is anticipated that additions or modifications may be made to the list of witnesses following receipt of interrogatory answers from Reilly Tar and development of the facts relevant to the City's forthcoming cross-claim. The following persons are identified at this time.

Chris Cherches
Reno, Nevada

Susan Workman Cherches
Reno, Nevada

Harvey J. McPhee
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

David Rudberg
Vancouver, British Columbia, Canada

Richard Koppy
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

R. O. Folland, P.E.
8006 North Virginia Circle
St. Louis Park, Minnesota

William Thibault
City of St. Louis Park
St. Louis Park Housing and
Redevelopment Authority
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

Vern Tollefsrud
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

James Jones
Evanston, Illinois

Robert Locky
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

Earl Hanson
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

John Elwell
Ames, Iowa

James Brimeyer
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota

Maynard Kays
9804 Teakwood Drive
Sun City, Arizona

Jim Miceli
3344 Xenwood
St. Louis Park, Minnesota

Eugene A. Hickok
E. A. Hickok & Associates
545 Indian Mound
Wayzata, Minnesota

Wayne Long
Orr, Schelen, Mayeron & Associates, Inc.
2221 East Hennepin Avenue
Minneapolis, Minnesota

4. Concise statement of the facts.

I.

Like the United States and the State of Minnesota, the City of St. Louis Park asserts claims under the Comprehensive Environmental Responses, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Minnesota Environmental Rights Act, and under the common law doctrines of strict liability, nuisance, negligence, abnormally dangerous activity, and damage to vested water rights. The City of St. Louis Park references the Court to the statements of those co-plaintiffs for the facts supporting those claims.

II.

One claim unique to the City of St. Louis Park is for declaratory and supplemental relief judicially finding that a hold harmless agreement between it and Reilly Tar is inapplicable to this case of carcinogenic contamination of ground

waters and is null and void. A summary of the facts regarding that claim follows.

In October, 1970, the State of Minnesota, through its Pollution Control Agency, and the City of St. Louis Park jointly commenced an action against Reilly Tar. This action was venued in the State District Court, Hennepin County. It sought to enjoin Reilly Tar from any further pollution of the air and of surface waters.

There was no claim for ground water contamination in the 1970 action. Testing by the Minnesota Department of Health and by the Mellon Institute showed no contamination of the drinking water supply of St. Louis Park. These tests were performed in 1970.

An earlier test performed in 1969 by a private consultant, Hickok & Associates, showed some phenols in the City wells used to supply drinking water. That test was dismissed as invalid because its results could not be duplicated by the more authoritative testing during 1970.

Also, it was and is undisputed that any phenols in the drinking water supply did not present any risk to health. Phenols are not polynuclear aromatic hydrocarbons, the carcinogenic compounds that are the subject of this suit. The worst consequence from phenols in drinking water supplies is an objectionable taste and odor.

Because the 1970 action sought injunctive relief, it became moot when Reilly Tar announced it was closing its St. Louis Park operation. With the cessation of operations, there would be no further emissions into the air and no further plant effluent into surface waters. Nothing was left for the lawsuit to operate against.

The plant property owned by Reilly Tar was then for sale to any interested party. Reilly Tar also considered simply holding the property for later development.

The City of St. Louis Park was interested in purchasing the property as part of an urban renewal plan for the area. On April 14, 1972, a purchase agreement between the City and Reilly Tar was executed.

The City paid fair market value for the property. Although the purchase agreement called for the dismissal of the 1970 action by both the Pollution Control Agency and the City, there was no discount in price for that dismissal.

Before entering into the purchase agreement, the City understood that certain site clean-up would be necessary prior to any development of the property. As a result of Reilly Tar's operations, certain areas of the 80 acre site were contaminated with creosote and coal tar. After consultation with the State, the City preferred to undertake this limited soil restoration itself rather than amend the complaint of

the 1970 action and force Reilly Tar to undertake the restoration. The City believed it would do the job better and faster thereby benefitting its residents and the public generally.

The City understood that a certain limited amount of work would be necessary to restore the site to a condition acceptable to the Pollution Control Agency. The City and the MPCA undertook to agree to the details of that clean-up work. At no time was there any hint of carcinogens or other health risks associated with the Reilly Tar operation.

Upon the closing of the purchase of the property in June, 1973, the MPCA had yet to detail the precise clean-up required. It would not, at that time, give its dismissal of the 1970 action. The MPCA continued to work with the City on those details and continued to indicate that the dismissal would be forthcoming upon agreement of the restoration to be done.

In substitution for the MPCA dismissal of the 1970 suit, the City gave Reilly Tar a hold harmless agreement against claims of the MPCA. There was no adjustment of the purchase price and no consideration was received by the City for this agreement. The agreement was designed to protect Reilly Tar only against any further claims for air or surface water pollution: the subject matter of the 1970 lawsuit. It was not designed to protect Reilly Tar against this much different

matter of ground water contamination resulting in a cancer threat to the public's health.

Neither the City nor Reilly Tar believed that any adverse public health consequences could result from the Reilly Tar operations. Unfortunately, both parties were operating under a mutual mistake of fact.

In addition, Reilly Tar represented, publicly and privately, that it had never contaminated ground waters from its operations. In fact, however, Reilly Tar knew that the deep well on its property was contaminated with tar. Since the initiation of this lawsuit, approximately 800 gallons of creosote and coal tar have been removed from this well.

Employees of Reilly Tar knew that hundreds of gallons of creosote oil had once spilled on the property. Those same employees met with City officials to discuss the City's concerns about the continued quality of the public drinking water supply and said nothing about the previous spill. They knew, however, that Reilly Tar had never done anything to clean up that spill.

Because of these and similar facts the City has sought a judicial declaration of the inapplicability of the hold harmless agreement in this case. Reilly Tar seeks to construe the agreement beyond its intended purpose, the agreement is void because of mutual mistake of fact and because it is infected by the misrepresentations of Reilly Tar. This case

of carcinogenic contamination of ground waters is wholly different from the 1970 action and any indemnification as argued by Reilly Tar would be ultra vires the City, against public policy, contrary to the police powers doctrine and void.

III.

Reilly Tar has recently amended its answer to assert a counterclaim against the City of St. Louis Park. It seeks to have the City indemnify it for any liability it may have pursuant to the hold harmless agreement. The City vigorously denies that claim for the reasons discussed above.

Reilly Tar's counterclaim does, however, force the City to assert a cross-claim against its co-plaintiffs, the Pollution Control Agency and the State of Minnesota. The cross-claim is to estop the MPCA from enforcing any judgment against Reilly Tar to the extent Reilly Tar is awarded indemnification from the City. The City would not have entered into the hold harmless agreement but for the assurances and representations of the MPCA staff regarding the nature of the pollution issues associated with the Reilly Tar operations and the limited scope of site restoration.

If taxpayers are to be forced to respond financially for the harm caused by Reilly Tar, that tax burden must be borne by all of the State's residents because of the involvement of State agencies in the City's purchase of the property.

The MPCA staff advised the City there was no health

threat associated with any phenolic contamination of the City's drinking water supply. It also concluded, on the basis of the 1970 tests that the drinking water supply was not contaminated. It was believed and represented to the City that environmental damage from Reilly Tar's operation would be remedied by (1) Reilly Tar's decision to close its operations; (2) placement of a top soil or sealing clay over the top of the contaminated ground, (3) some limited soil removal or restoration, and (4) special installation of a storm sewer system. MPCA staff advised that with remedial measures of this nature the matter would be closed; there would be no further harm to remedy.

The City purchased the property and entered into a hold harmless agreement with Reilly Tar on the basis of these assurances. The hold harmless agreement was viewed as only a temporary substitute for the dismissal of the 1970 lawsuit by the MPCA. It was fully expected that the dismissal would be forthcoming, awaiting only the reduction to writing of the details of the clean-up program under discussion.

The City does not contend that the MPCA staff acted with any culpable intent. For all of the reasons stated previously, the hold harmless agreement should not be enforced. The City and the State were ignorant of the true facts of the health threat from Reilly Tar's operations. But, should Reilly Tar effectively escape its responsibility, then the State must

be estopped from visiting the consequences of that upon the City of St. Louis Park alone.

5. Affirmative claims of defense.

Not applicable other than as discussed above.

6. Exhibits to be offered at trial.

The City is not able, at this time, to identify those documents to be used at trial. An exhibit list will be provided prior to trial. Based on the deposition exhibits to date, it is anticipated that one hundred exhibits could be offered. The City hopes that the number of exhibits offered at trial will be less.

7. Amendments to pleadings.

Although not technically an amendment, the City must respond to the recent counterclaim of Reilly Tar and assert its cross-claims against the State of Minnesota and the Pollution Control Agency.

8. Discovery procedures.

a. Discovery completed to date.

The City has received one document production from Reilly Tar and participated in the depositions noted by other parties. Also, there have been some informal document exchanges

between the parties.

b. Discovery to be completed.

Because some new issues have been raised by Reilly Tar's counterclaim, the City is uncertain, at this time, of the full scope of further discovery. The following is currently contemplated by the City:

- 1) Interrogatories
- 2) Supplemental document request
- 3) Request for Admissions
- 4) Approximately five depositions

c. Discovery completion date.


April, 1984.

9. Estimated trial time.

Up to twelve (12) weeks.

Dated: March 25, 1983.

POPHAM, HAIK, SCHNOBRICH, KAUFMAN
& DOTY, Ltd.

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